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No. 00-6374

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DALE G. BECKER,

Petitioner,

v.

BETTY MONTGOMERY,
ATTORNEY GENERAL OF OHIO, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW AT THE INVITATION OF THE COURT

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QUESTION PRESENTED

When a party files a timely notice of appeal in district court, does the failure to sign the notice of appeal require the court of appeals to dismiss the appeal?

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OPINIONS BELOW

The unpublished order of the United States Court of Appeals for the Sixth Circuit, entered on May 12, 2000, is reprinted in the Joint Appendix ("J.A.") separately filed. J.A. 16-17. The court of appeals' unpublished order denying Petitioner's motion for reconsideration is reprinted at J.A. 18. The unreported order and judgment of the United States District Court for the Southern District of Ohio are reprinted at J.A. 4-11.

JURISDICTION

The court of appeals entered its judgment on May 12, 2000. A timely motion for reconsideration was denied on July 14, 2000. The petition for certiorari was filed on October 6, 2000. Certiorari was granted on January 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

FEDERAL RULES INVOLVED

Rules 1(a) and 3(c) of the Federal Rules of Appellate Procedure appear in an appendix to this brief. Also in the appendix is Rule 11(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioner is an Ohio prison inmate and a frequent *pro se* litigant. On August 27, 1999, Petitioner filed a federal civil rights action against Ohio prison officials for exposing him to secondhand smoke. The typewritten complaint was manually signed by Petitioner.

The same day that Petitioner filed his complaint, the district court *sua sponte* dismissed the action under the screening provisions of the Prison Litigation Reform Act, 28 U.S.C. § 1915A. The district court concluded that Petitioner failed to state a claim upon which relief may be granted and also failed to exhaust his administrative remedies. J.A. 4-11.

On September 20, 1999, Petitioner filed a timely notice of appeal. The notice of appeal was not signed by hand. Instead, Petitioner's name was typed in the space provided for the signing of the notice of appeal. J.A. 12.

On May 12, 2000, a Sixth Circuit panel dismissed the appeal *sua sponte* for lack of jurisdiction. The court of appeals found that the notice of appeal was "defective because it was not signed by the pro se appellant or by a qualified attorney," citing *Mattingly v. Farmers State Bank*, 153 F.3d 336, 337-38 (6th Cir. 1998). J.A. 16-17.

Petitioner timely petitioned for certiorari. Respondents then notified the Court that they would not defend the Sixth Circuit's dismissal of the appeal for want of jurisdiction. They maintained that the Sixth Circuit should have dismissed the appeal for lack of substantive merit. This Court granted certiorari and invited Stewart Baker to brief and argue this case as *amicus curiae* in support of the judgment below.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the last quarter-century, federal courts have faced growing numbers of *pro se* cases, many of them brought by prison inmates like the Petitioner.[2] The tide of filings has forced federal courts at all levels to consider the differences

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[1] This brief could not have been completed without the support of Steptoe & Johnson LLP and several of its attorneys, whose contributions are acknowledged with gratitude: Jason H. Ehrenberg, Jamie Underwood, Alice E. Loughran, Aaron M. Altschuler, and Jeffrey F. Pryce.

[2] *See, e.g.*, Robert G. Doumar, *Prisoner Cases: Feeding The Monster In the Judicial Closet*, 14 St. Louis U. Pub. L. Rev. 21, 21-25 (1994); Michael J. Mueller, *Abusive Pro Se Plaintiffs In The Federal Courts: Proposals For Judicial Control*, 18 U. Mich. J.L. Reform 93 (1984); *Comment, Pro Se Litigants: Application of a Single Objective Standard Under FRCP 11 To Reduce Frivolous Litigation*, 16 U. Puget Sound L. Rev. 1371 (Spring 1993) (*pro se* cases make up a significant portion of the dockets of federal district courts).

between *pro se* litigants and represented parties. Sometimes *pro se* litigation simply requires that courts muster extra patience—to determine, for example, whether a valid legal theory can be found to support an inarticulate *pro se* complaint. But at other times the special character of *pro se* litigation also calls for special precautions.

The signature requirement at issue here is a good example. The courts of appeals have grappled since at least the 1970s with the problem of how to determine whether every *pro se* party in a case truly wishes to pursue the appeal. Because each *pro se* party in the case could be bound by the judgment—and made liable for the costs of a frivolous appeal—courts began to demand that each *pro se* party sign the notice of appeal, and to dismiss the appeals of those who did not.

The source of the requirement was somewhat problematic. In the district courts, of course, Rule 11 of the Federal Rules of Civil Procedure required that *pro se* parties sign every filing. The Federal Rules of Appellate Procedure, in contrast, had no explicit signature requirement. So where did appellate courts find authority to enforce the signature requirement?

The answer, adopted in cases like *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir. 1980), was to read the signature requirement into Rule 3(c) of the Federal Rules of Appellate Procedure. This rule requires that the notice of appeal must "specify the party or parties" seeking to appeal. *Covington* reasoned that the process of "specifying" *pro se* parties must include a demonstration of each party's individual intent and accountability, and that meant a signature: "The only means of determining which litigants are interested in pursuing an appeal is by requiring each pro se party to personally sign the notice of appeal." *Id.* at 64.

Whether that reading of Rule 3(c) was persuasive standing alone matters little, for it was soon strengthened mightily by two developments. First, in *Torres v. Oakland Scavenger*

Co., 487 U.S. 312, 314 & n.1 (1988), Justice Marshall wrote for the Court to clarify the specificity provision of Rule 3(c). It is a jurisdictional provision, he declared, and a party whose name is left off the notice of appeal, even due to simple clerical error, cannot cure the mistake once the time for filing the notice of appeal has expired. The reason, *Torres* held, was that courts and appellees must be able to determine "with certitude" which parties were appealing.

Then, in the wake of *Torres*, the Advisory Committee on the Federal Rules of Appellate Procedure began a focused initiative to revise Rule 3(c) and to spell out the meaning of "specify the party or parties" in particular contexts. One eager participant in the effort was Public Citizen Litigation Group, which suggested that the revisions should not only overturn *Torres* but should also create a special rule allowing a *pro se* party to appeal on behalf of a spouse and family members. The Public Citizen proposal did not impose a signature requirement on *pro se* parties. On the contrary, the proposal would have reversed—*sub silentio*—the *Covington* line of cases requiring signatures on the notice of appeal.

The Advisory Committee was persuaded to write a rule interpreting "specify the party or parties" in the context of *pro se* appeals. But it declined Public Citizen's invitation to overturn *Covington*. Instead, it revised the Public Citizen proposal by adding an explicit signature provision—providing that a *pro se* notice of appeal would be considered filed "on behalf of *the party signing the notice*" as well as the signer's spouse and minor children. Fed. R. App. P. 3(c) (1993) (emphasis added). The Advisory Committee further emphasized the jurisdictional nature of the signature requirement by inserting it into the rules immediately following the requirement that the notice "specify the party or parties" taking the appeal. In short, between them, *Torres* and the 1993 Advisory Committee fully ratified the practice of the courts of appeals in treating *pro se* signatures as a jurisdictionally necessary element of the notice of appeal.

There is no escaping this history, nor should there be. Petitioner finds significance in further revisions adopted in 1998, arguing that the signature provision is no longer on the list of items that "must" be included in the notice of appeal. But it is clear that the signature provision was moved to a separate paragraph in 1998 for reasons of organization and flow rather than substance, and the 1998 drafters emphasized that the change was "stylistic."

Similarly, it is entirely appropriate to apply the signature requirement to Petitioner. He is an experienced *pro se* litigator who has pursued nearly twenty separate cases in state and federal court. In all his previous federal appeals, he has always signed the notice of appeal by hand, and he signed by hand every filing in the district court in the present case—except the notice of appeal.

One can only assume that for this appeal, Petitioner simply failed to consult the federal courts' rules of procedure, which would have alerted him to the signature requirement—not once or twice, but in three separate places. Rule 11 of the Federal Rules of Civil Procedure requires that, for a *pro se* party, "[e]very . . . paper . . . shall be signed by the party." Fed. R. Civ. P. 11. In the appellate courts, both the Federal Rules of Appellate Procedure and their sample forms call for a signature. The extremely simple form suggested by the appellate rules includes a signature line and prints on it the usual symbol for a handwritten signature—"(s)." Finally, as we've seen, Rule 3(c) of the appellate rules has called for a signature since 1993.

Nor can Petitioner escape the requirement simply because its rationale is more forceful in multiparty appeals than in the case of a single appellant. While multiparty cases provide the principal rationale for requiring a signature, the rules themselves do not exempt single appellants. On the contrary, both the district and appellate rules on this point are relentlessly singular, speaking of "the party" and "the signer."

And in fact, the requirement has value even in single appellant cases, ensuring that appellants cannot escape responsibility for their filings and preventing third parties from injecting themselves into litigation. Nor does it cause serious prejudice to single-party appellants. Despite the posture of the present case, single appellants who fail to sign the notice of appeal are relatively rare. By far the most common application of the rule is in multiple appellant cases, probably because single appellants have already been required to sign every one of their district court filings before submitting a notice of appeal.

Finally, Petitioner argues that his typed name should be treated as a signature. Pet. Br. 4-5. This argument has been rejected by each of the appellate courts that have considered it. And with good reason. It would defeat the purpose behind the signature requirement, which was adopted in the first place because *pro se* parties were all too willing to type their coparties' names on notices of appeal. The federal rules require that *pro se* parties sign notices of appeal so that courts of appeal will have objective evidence, within the four corners of the document, that each party intends to join the appeal. Substituting a typed name for a handwritten signature would eliminate much or all of the signature's evidentiary value. Unlike the cases in point, which reject his reading, Petitioner can find support for his interpretation only in contexts where signatures serve very different functions.

ARGUMENT

I. The Federal Rules of Procedure Require *Pro Se* Parties to Sign the Notice of Appeal

The courts of appeals have been virtually unanimous in requiring that each *pro se* party sign the notice of appeal.[3]

[3] *See, e.g., Rivera v. Riley*, 209 F.3d 24, 27 (1st Cir. 2000); *Covington v. Allsbrook*, 636 F.2d 63, 64 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981); *Mikeska v. Collins*, 928 F.2d 126, 126 (5th Cir. 1991) (*per curiam*); *Mattingly*, 153 F.3d at 337-38; *Scarrella v. Midwest Fed. Sav. & Loan*, 536 F.2d 1207, 1209 (8th Cir.), *cert. denied*, 429 U.S. 885 (1976); *United States v. Johnson*, 43 F.3d 1308, 1310 n.1 (9th Cir. 1995).

The near-unanimity of the courts is grounded in the language of the federal rules of procedure, where not one or two but three separate provisions alert *pro se* parties to the importance of signing the notice of appeal.

A. A Signature Is Required by Rule 11 of the Federal Rules of Civil Procedure

An explicit signature requirement has always been part of Rule 11 of the Federal Rules of Civil Procedure:

> *Every* pleading, written motion, *and other paper* shall be signed by at least one attorney of record . . . or, *if the party is not represented by an attorney, shall be signed by the party*. . . . An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Civ. P. 11(a) (emphasis added).[4]

B. A Signature Is Required by the Federal Rules of Appellate Procedure

The Federal Rules of Appellate Procedure yield the same conclusion. In two places, they make clear that *pro se* parties are expected to sign the notice of appeal.

1. First, the signature requirement is impressed even on a *pro se* party who skips the rules and goes straight to the forms in the back of the book. The very first form in the Appendix to the Federal Rules of Appellate Procedure is a suggested notice of appeal. This is a remarkably simple document. It does not call for much, but it does call for a signature. It shows a line on which the party is to sign, and to eliminate

[4] Under Rule 11, a notice of appeal, like any other paper filed in district court, must be signed. *See., e.g., Scarrella*, 536 F.2d at 1209; *McKinney v. De Bord*, 507 F.2d 501, 503 (9th Cir. 1974).

any doubt, it includes the usual symbol for an actual handwritten signature—"(s)"—on that line to make clear that an actual signature is expected. It is nearly impossible to consult this form without coming to the conclusion that it should be signed before it is filed.

2. Not surprisingly, the rules accord with the form. As adopted in 1993, Rule 3(c) of the Federal Rules of Appellate Procedure tells appellants how a *pro se* notice of appeal should be filed: "*A notice of appeal filed pro se is filed on behalf of the party signing the notice* and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent." Fed. R. App. P. 3(c) (1993) (emphasis added).

This provision was modified in 1998, but the Advisory Committee emphasized that the changes were "stylistic only." Fed. R. App. P. 3, Advisory Committee's Notes (1998 Amendments). The 1998 revision, still in effect, states that "*[a] pro se notice of appeal is considered filed on behalf of the signer* and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise." Fed. R. App. P. 3(c) (emphasis added).

3. These rules are supported by policy. In the most common case, where there are multiple *pro se* parties, requiring each of them to sign the filings prevents a single litigant from making legal judgments for the other litigants, judgments that should be made only by a lawyer or by each *pro se* litigant for himself. By signing, they make it clear to the court and to the appellee that each of them does indeed intend to appeal and be bound by the result, something that would not be clear if one *pro se* litigant could simply add other parties to the document without their knowledge or consent.

Adding parties to a case without their express and incontrovertible consent can distort the litigation and harm those parties' interests. This is most plain at the time of filing

a complaint, when parties joining the case run the risk of *res judicata* and collateral estoppel based on the mistakes of a legally untrained layman.[5] But it can cause harm on appeal as well. One party's claims may become moot, making the status of the parties crucial to the court's jurisdiction [6]; or the appeal may be found frivolous and costs assessed against each appellant.[7] Even if costs are not imposed, the "three strikes" rule means that a *pro se* party who casually or unwittingly joins a series of frivolous *pro se* cases could later have difficulty pursuing other cases of more importance to him or her.[8] For these reasons, there must be no doubt about which parties have joined the appeal.

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[5] *Allen v. McCurry*, 449 U.S. 90, 103-04 (1980) (rules of collateral estoppel apply to § 1983 civil rights suits and encompass state-court judgments); *Klein v. Zavaras*, 80 F.3d 432, 434-45 (10th Cir. 1996) (*pro se* prisoner's due process and equal protection claims raised in civil rights action barred under issue preclusion principles); *see also* 28 U.S.C. § 2244 (1994 & Supp. IV 1998) (strictly limiting second or successive habeas petitions).

[6] *See, e.g., Van Hoose v. Eidson*, 450 F.2d 746 (6th Cir. 1971) (in challenge to high school hair code, the only proper appellant had graduated; court dismissed appeal as moot); *see also Oxendine v. Williams*, 509 F.2d 1405, 1406 (4th Cir. 1975) (refusing to approve *pro se* class action on behalf of "all inmates incarcerated at the Caswell County Unit" because certification would prevent other inmates from later raising the same claims).

[7] *See, e.g., Galvan v. Cameron Mut. Ins. Co.*, 831 F.2d 804, 805-06 (8th Cir. 1987) (*per curiam*) (court of appeals assesses double costs against indigent for filing and appealing frivolous civil rights claim); *Simmons v. Poppell*, 837 F.2d 1243, 1244 (5th Cir. 1988) (court of appeals awards costs against a *pro se* party who pursued appeal after a warning from the district court that his action was frivolous); *Lay v. Anderson*, 837 F.2d 231, 232-33 (5th Cir. 1988) (court awards costs to be paid "from his prison account or any other source of assets or income he may have"), *mandamus denied*, 493 U.S. 806 (1989).

[8] *See* 28 U.S.C. § 1915(g) (barring prisoners from filing a new action or appeal *in forma pauperis* if that prisoner filed three or more suits deemed frivolous, unless the prisoner is under imminent danger); *Abdul-Akbar v. McKelvie*, 239 F.3d 307 (3d Cir. 2001) (*en banc*).

4. In this case, of course, there is only one appellant. But that fact should not distort interpretation of the signature requirement as a whole, because in practice the requirement is invoked far more often when there are multiple appellants (probably for practical reasons that we discuss later).[9] Still, it is clear that the policies behind the signature requirement have less force in single-appellant cases, which raises the question whether single appellants can somehow be exempted from the signature requirement.

The rules themselves provide the answer. They are relentlessly singular: Rule 11 imposes its signature obligation

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[9] Among published appellate opinions addressing the signature requirement, less than twenty percent involved single appellants. Among unpublished opinions, our research suggests that single-appellant cases represent as little as ten percent of the cases decided.

Four published opinions involved single appellants: *Price v. U.S. Navy*, 39 F.3d 1011, 1014-15 (9th Cir. 1994); *McNeil v. Blackburn*, 802 F.2d 830, 832 (5th Cir. 1986); *Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 830 (7th Cir. 1986); *Thiem v. Hertz Corp.*, 732 F.2d 1559, 1562-63 (11th Cir. 1984).

Eighteen published opinions involved multiple appellants: *Rivera*, 209 F.3d at 27; *Talley-Bey v. Knebl*, 168 F.3d 884, 885 (6th Cir. 1999); *Mattingly*, 153 F.3d at 336-38; *Johnson*, 43 F.3d at 1310 n.1; *Kane v. United States*, 15 F.3d 87, 87 n.1 (8th Cir. 1994); *Carter v. Stalder*, 60 F.3d 238, 239 (5th Cir. 1995); *Aziz v. Moore*, 8 F.3d 13, 14 n.2 (8th Cir. 1993); *James v. United States*, 970 F.2d 750, 753 n.3 (10th Cir. 1992); *Mikeska*, 928 F.2d at 126; *United States v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990); *Elias v. Connett*, 908 F.2d 521, 522 n.1 (9th Cir. 1990); *Massengill v. Comm'r*, 876 F.2d 616, 618 n.7 (8th Cir. 1989); *Smith v. White*, 857 F.2d 1042, 1043 (5th Cr. 1988); *Carter v. Comm'r*, 784 F.2d 1006, 1008 (9th Cir. 1986); *Covington*, 636 F.2d at 64; *Theriault v. Silber*, 579 F.2d 302, 302 n.1 (5th Cir. 1978); *Scarrella*, 536 F.2d at 1209; *McKinney*, 507 F.2d at 503.

A search of unpublished cases conducted on Westlaw's Court of Appeals ("CTA") database and covering the period 1991 to 2000 revealed seventy-eight cases dismissing appellants for failure to sign the notice of appeal; of those, eight involved single appellants.

on "the party" who is not represented by an attorney, while Rule 3(c) speaks of "the signer." These words simply cannot be read as applying only when the appellants are plural.

Nor is such a reading required by policy. Even when only one *pro se* party seeks to appeal, the signature requirement serves essential purposes. First, it is all too common for individuals to file frivolous appeals, perhaps to get the benefit of a temporary stay of deportation,[10] or to harass officials,[11] or for any number of other reasons.[12] Courts control these frivolous filings by imposing costs, but that is more difficult to do if the appellant can plausibly deny responsibility for the filing, something the signature requirement prevents. The signature requirement thus ensures greater accountability on the part even of single appellants. Second, surprisingly often, third parties with a variety of motives simply file litigation or

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[10] Filing a notice of appeal normally "provides aliens subject to deportation with procedural protection even stronger than that given to prisoners under sentence of death . . . ." *Dallo v. INS*, 765 F.2d 581, 589 n.9 (6th Cir. 1985); *see also De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997) (providing for an automatic stay of removal pending the court's ruling on the stay motion).

[11] *Nasim v. Warden, Md. House of Correction*, 64 F.3d 951, 953 n.1 (4th Cir. 1995) (*en banc*) ("all too often" prisoner litigation is initiated "to harass prison officials"), *cert. denied*, 516 U.S. 1177 (1996).

[12] *See Cruz v. Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting) (for inmates, the filing of a frivolous complaint may be a means of gaining "a short sabbatical in the nearest federal courthouse."); *see also Gabel v. Lynaugh*, 835 F.2d 124, 125 n.1 (5th Cir. 1988) (*per curiam*) ("pro se civil rights litigation has become a recreational activity for state prisoners"); *Fiore v. Thornburgh*, 658 F. Supp. 161, 165 (W.D. Pa.) (finding that the *pro se* party brought action "in order to harass defendants who had testified against him, prosecuted him or acted as judges in prior criminal proceedings"), *aff'd mem.*, 833 F.2d 304 (3d Cir. 1987); *Peth v. Breitzmann*, 611 F. Supp. 50, 56 (E.D. Wis. 1985) (finding that *pro se* party brought action "for the invidious purpose of 'getting back' at the I.R.S.").

appeals on behalf of a party who might not otherwise pursue legal remedies. Indeed, in many cases, these "next friends" attempt to file on behalf of a party who opposes further legal action.[13] Under these circumstances, the signature requirement provides incontrovertible evidence that the real party to the litigation wishes to advance his interests on appeal, thus satisfying the "case or controversy" requirement of Article III. All these considerations explain why none of the courts to consider the issue—and none of the relevant rules—exempt single-party appeals from the signature requirement.

5. Finally, there is no reason to believe that in practice the signature requirement has been difficult for *pro se* litigants to understand or obey. By definition, a party filing a notice of appeal has already made filings in the district court—and has been required to sign every one. That the last filing must be signed as well is not surprising, especially for parties who read the appellate rules and forms. Nor is it burdensome. This practical fact may explain why the requirement only occasionally affects single appellants.

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[13] *See, e.g., Gilmore v. Utah*, 429 U.S. 1012 (1976) (rejecting attempt by mother and "next friend" to challenge convicted murderer's death sentence); *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (rejecting one death row inmate's effort to challenge death sentence of a second inmate); *Lewis*, 784 F.2d at 830 (rejecting notice of appeal signed not by plaintiff but by consultant specializing in "court-related grievances"); *Smith*, 857 F.2d at 1043 (layperson cannot represent others in filing a notice of appeal); *Carter v. Stalder*, 60 F.3d at 239 (notice of appeal signed by a nonlawyer on his own behalf and on behalf of another is effective only as to the signer).

Indeed, until the present appeal, Petitioner had shown a firm grasp of the requirement. He is a thoroughly experienced *pro se* litigant. In the space of eight years, he has filed and appealed, often through multiple levels of review, no fewer than nineteen state and federal lawsuits.[14] At least

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[14] Petitioner's litigation spans several categories. He has instituted at least four federal lawsuits asserting that a variety of state prison policies violated his civil rights. *See Becker v. Ghee*, No. C2-99-966 (S.D. Ohio Apr. 25, 2000), *aff'd*, No. 00-3631, 2000 WL 1827751 (6th Cir. Dec. 8, 2000); *Becker v. Montgomery*, No. 99-CV-825 (S.D. Ohio Aug. 27, 1999), *dismissed* No. 99-4190 (6th Cir. 2000), *cert. granted*, No. 00-6374; *Becker v. Wilkinson*, No. C2-00-505 (S.D. Ohio Sept. 25, 2000), *dismissed*, No. 00-4276 (6th Cir. Jan. 25, 2001); *Klopp v. McAninch*, No. 95-CV-424 (S.D. Ohio Oct. 30, 1995). Petitioner has also filed one state challenge asserting that his Eighth Amendment rights were violated because he was exposed to secondhand smoke. *See Becker v. McAninch*, No. 98CA2450, 1998 WL 903496 (Ohio Ct. App. Dec. 28, 1998), *jurisdiction declined*, No. 99-0258 (Ohio Apr. 28, 1999). In addition, Petitioner has filed at least nine collateral attacks to his underlying criminal conviction and sentence. *See Becker v. Mohr*, No. C-1-97-655, *consolidated with Becker v. Mohr*, No. C-98-142 (S.D. Ohio Oct. 14, 1998); *Becker v. Ghee*, No. 99-617 (Ohio May 26, 1999); *Becker v. Randle*, C-1-01-003 (S.D. Ohio Jan. 4, 2001); *State of Ohio v. Becker*, CA 97-03-028, 1997 WL 563274 (Ohio Ct. App. Sept. 8, 1997), *jurisdiction declined*, No. 97-2131 (Ohio Jan. 21, 1998); *State of Ohio v. Becker*, CA96-07-057, 1997 WL 50154 (Ohio Ct. App. Feb. 10, 1997), *leave to appeal denied mem.*, 679 N.E.2d 311 (Ohio 1997); *State of Ohio v. Becker*, CA2000-06-47, 2001 WL 15630 (Ohio Ct. App. Jan. 8, 2001); *In re Dale G. Becker*, No. 00-3368 (6th Cir. Aug. 8, 2000); *Becker v. McAninch*, No. 97-CV-665 (S.D. Ohio Oct. 14, 1998), *cert. of appealability denied*, No. 98-4347 (6th Cir. Mar. 19, 1999). Petitioner has also instituted three actions against his former wife and her divorce attorney making a variety of claims arising from the dissolution of the couple's marital assets. *See Becker v. Becker*, No. CA93-04-024, 1993 WL 358147 (Ohio Ct. App. Sept. 13, 1993), *dismissed*, No. 93-2356 (Ohio Mar. 30, 1994); *Becker v. Becker*, No. CA95-01-002, 1995 WL 308505 (Ohio Ct. App. May 22, 1995), *dismissed mem.*, 687 N.E.2d 296 (Ohio 1997); *Becker v. Becker*, No. CA97-01-001, 1997 WL 451381

five times, he has appealed from federal district court to the Sixth Circuit, and he signed by hand every one of his notices of appeal to the Sixth Circuit—except for the notice filed in this case. *See* Lodging Material, Vol. II at 70-76.[15] He also signed by hand every one of the filings that he made in the federal district court in this case—except for the notice of appeal. *See* Lodging Material, Vol. II at 91, 98, 104, 112, 123, 133, 140, 154, 164-65. In short, it appears that he simply ignored the rules in this case; in such circumstances, the Court has no obligation to strain the rules to salvage his appeal.[16]

II. The Signature Requirement Is Jurisdictional

In fact, neither Petitioner nor Respondent seriously argues that the notice of appeal need not be signed. No one disagrees that the court below was confronted with a notice of appeal that violated federal rules of procedure. The question in dispute is what, if anything, the court could do about the violation.

(Ohio Ct. App. Aug. 11, 1997), *jurisdiction declined mem.*, 687 N.E.2d 296 (Ohio 1997); *Becker v. Becker*, No. C-1-98-073 (S.D. Ohio Jan. 23, 1998) (dismissed as frivolous). Finally, Petitioner has filed at least two mandamus suits in state court. *See Becker v. Court of Claims of Ohio*, No. 99 APD 12 1408 (Ohio Ct. App.), *declining jurisdiction*, No. 00-2088 (Ohio Mar. 7, 2001); *Becker v. Dep't of Rehabilitation and Correction of Ohio*, No. 99 APD 08 939 (Ohio Ct. App. Mar. 16, 2000). For the Court's convenience, we have lodged public record materials evidencing Petitioner's prior litigation in the state and federal courts with the Clerk's office. *See* Lodging Material, Vol. II.

[15] In the other appeals, petitioner filed three signed notices of appeal and one signed petition for leave to file a successive petition in the district court, which the court of appeals construed as a notice of appeal. *See* Lodging Material, Vol. II at 70-76.

[16] *Cf. Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) (and the cases cited therein) ("One who proceeds *pro se* with full knowledge and understanding of the risks involved acquires no greater rights than a litigant represented by a lawyer . . . . Rather, such a litigant acquiesces in and subjects himself to the established rules of practice and procedure.").

A. The Court of Appeals May Not Act Under Rule 11 of the Federal Rules of Civil Procedure

Both Petitioner and Respondent suggest that the court of appeals was limited to taking action under Rule 11 of the Federal Rules of Civil Procedure.[17] Rule 11 provides, "[a]n unsigned paper shall be stricken unless omission of the signature is promptly corrected after being called to the attention of the attorney or the party." Fed. R. Civ. P. 11. Petitioner and Respondent suggest that the court of appeals should have drawn the lack of a signature to Petitioner's attention under this rule and then waited for him to correct it; if he did not, the notice could have been struck.

Appealing as it may be, this scenario has no support in law. Rule 11 confers no authority on a court of appeals. The first sentence of the first Federal Rule of Civil Procedure makes that clear: "These rules govern the procedure *in the district courts* . . . ." Fed. R. Civ. P. 1 (emphasis added). Rule 11 is no different; this Court has specifically held that the rule contains no authority for appellate court action. "On its face," this Court declared, "Rule 11 does not apply to appellate proceedings." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406 (1990). The courts of appeal, too, have disavowed any authority to impose sanctions under district court Rule 11.[18]

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[17] Pet. Br. 9, 16-17; Resp. Br. 11-15, 18-22.

[18] *See Partington v. Gedan*, 923 F.2d 686, 688 (9th Cir. 1991); *see also In re Nagy*, 89 F.3d 115, 116-17 (2d Cir.) (declaring that the Federal Rules of Civil Procedure apply only to district courts) (citing Fed. R. Civ. P. 1), *writ of habeas corpus denied*, 519 U.S. 1027 (1996); *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988) (Fed. R. Civ. P. 11 and all other federal rules of civil procedure govern the procedures in the district courts, not appellate courts) (citations omitted); *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991) (the Federal Rules of Civil

The significance of these precedents for the present case is also plain: if Rule 11 does not give the courts of appeals authority to impose sanctions, it does not give them authority to strike unsigned notices of appeal, or even to threaten such action if the notice of appeal is not promptly corrected. Rule 11 cannot be used to enforce the signature requirement in the appellate courts.

Even if the courts of appeals had authority to dip at will into the district courts' rules and borrow their procedures, there are good reasons not to do so. The district court rules are written for a factfinder with a flexible docket. A district court can hold hearings and make findings as to whether an opposing party has been prejudiced by the lack of a signature. It can use that same factfinding capability to determine whether a correction has been made "promptly." And its procedures are built around hearings and status conferences and interim orders that are well suited to the somewhat open-ended remedy specified in Rule 11. None of these things is true of the courts of appeals, and it would be imprudent for appellate courts to try to administer such a scheme even if their rules allowed it, which of course they do not.[19]

Procedure do not apply to cases in the courts of appeals); *Covington*, 636 F.2d at 64 n.2.

[19] If further disincentive were needed, the procedural difficulty of applying Rule 11 in the appeals court is equally troubling. If the signature were not supplied promptly, would the appellate court strike the notice of appeal? Even assuming it had such authority over the district court's docket, what would then happen to the court's jurisdiction over the case—indeed, to its jurisdiction to issue the order striking the notice of appeal?

Nor can the district court do the job for the appeals courts. Once the notice of appeal has been filed, the case belongs to the court of appeals. *Griggs v. Providence Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). It would not be orderly—or perhaps even lawful—for the district court to strike from its docket the document

The appellate courts' lack of authority to act under Rule 11 does not mean that the rule is utterly irrelevant to appellate courts faced with an unsigned notice of appeal. By violating Rule 11, appellants also violate the Federal Rules of Appellate Procedure. This is because the requirements of Rule 11 are imported directly into the appellate rules, which command that any appellate documents filed in the district court, such as a notice of appeal, "must comply with the practice of the district court." Fed. R. App. P. 1(a)(2).[20] Thus, an unsigned notice of appeal violates Rule 1 of the

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that gives the appellate court jurisdiction over the matter. Even if it were, it would also raise a host of difficult procedural questions: What would be done if, as is typical, the notice of appeal is signed by one *pro se* party but not by others? Is this single piece of paper to be struck or not? Struck in part?

Perhaps the usual judicial order could be preserved if the court of appeals, upon finding an unsigned notice of appeal, were to return the case to the district court with instructions to apply Rule 11. But, Rule 11 on its face is not mandatory; the district courts are not required to strike unsigned notices—particularly in the absence of a contemporaneous objection. So, what error justifies returning the matter to the district court? Finally, if the *pro se* party does promptly correct and resubmit the notice of appeal, must the notice be accepted even years after the jurisdictional time limits of appellate Rule 4 have expired? If not, is the case somehow magically suspended in a jurisdiction-free zone while awaiting a signature from the *pro se* party? The number and the difficulty of these questions counsel against an effort to graft Rule 11 to the appellate courts' procedures.

[20] When adopting this provision in 1979, the Advisory Committee made clear that it covers the notice of appeal, which appellants must file in district court in accordance with appellate Rule 4(a):

> In some instances . . . the F.R.A.P. provides that a motion or application for relief may, or must, be made in the district court. *See* Rules 4(a), 10(b) and 24. The proposed amendment would make it clear that when this is so the motion or application is to be made in the form and manner prescribed by the F.R.C.P. . . .

Fed. R. App. P. 1, Advisory Committee Notes (1967 Amendments).

Federal Rules of Appellate Procedure. This violation must have a remedy, but the remedy should be found in the appellate rules, not those of the district courts.

B. The Signature Requirement Is a Jurisdictional Element of Rule 3(c) of the Federal Rules of Appellate Procedure

That is precisely where many courts of appeal have found the remedy. These courts have rejected *pro se* notices of appeal that are not signed—concluding that such notices do not properly "specify the party or parties taking the appeal" as required by Rule 3(c) of the Federal Rules of Appellate Procedure. Because the notice of appeal is the document on which appellate jurisdiction rests, these courts hold, a violation of Rule 3(c) means that the appeal must be dismissed.[21]

1. This is not a new reading of Rule 3(c). It does not even depend on the provision of Rule 3 that specifically deals with *pro se* parties signing the notice of appeal. The courts of appeals began to adopt this approach long before the *pro se* signature provision was added to the rules in 1993. Perhaps the most thoughtful of these early decisions was *Covington v. Allsbrook*, 636 F.2d 63 (4th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981). There, the Fourth Circuit found a *pro se* signature requirement in the language requiring that each notice of appeal "shall specify the party or parties taking the appeal." Fed. R. App. P. 3(c) (1979). Although at the time there was no reference to signatures in appellate Rule 3(c), the *Covington* court nonetheless concluded that:

> The only means of determining which litigants are interested in pursuing an appeal is by requiring each *pro se* party to personally sign the notice of appeal.

[21] *See, e.g., Talley-Bey v. Knebl*, 168 F.3d at 885; *Carter*, 784 F.2d at 1008; *Mattingly*, 153 F.3d at 336-38; *Johnson*, 43 F.3d at 1310 n.1.

> Imposition of this requirement does not unduly burden the prospective appellant and acts to protect the rights and interests of all parties to the litigation. It is the only practical way to *specify* the party or parties taking the appeal, as required by Rule 3(c).

636 F.2d at 64 (emphasis in original). Holding that parties not specified in the notice of appeal were jurisdictionally barred from pursuing an appeal, the Fourth Circuit dismissed those parties that had not signed the notice.

The *Covington* analysis would be enough by itself to justify the dismissal of Petitioner's appeal. But Rule 3(c) has since been both interpreted and amended in a fashion that greatly reinforces that analysis.

2. Any doubts about the jurisdictional nature of Rule 3(c) were laid to rest by this Court in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which determined that a failure to "specify the party or parties taking the appeal" was in fact a jurisdictional failure. In *Torres*, the petitioner was one of 16 plaintiffs in an employment discrimination case. The plaintiffs' loss in the district court was reversed by the court of appeals, but the petitioner's name had not been included in the notice of appeal. It was not his fault; the omission was a clerical error by his attorney's secretary. But the fact remained that his name was not in the order of the appellate court. The courts below declared the dismissal final as to petitioner by virtue of his failure to appeal. *Torres*, 487 U.S. at 313-14.

This Court affirmed. Writing for the Court, Justice Marshall addressed two provisions of the federal rules of procedure that the courts often use to cure litigation errors and avoid harsh results. First, the *Torres* Court recognized that Rule 3(c) excuses "informality of form or title." *Id.* at 314. But, the Court held, it is one thing to permit imperfect compliance with a technical requirement and quite another to waive the requirement altogether. The failure to name a party

in a notice of appeal is not some excusable "informality"; it constitutes a failure of that party to appeal. *Id.*

Torres also recognized that Rule 2 of the Federal Rules of Appellate Procedure gives courts of appeals broad power to suspend the requirements of the rules for "good cause shown," and that *Foman v. Davis*, 371 U.S. 178 (1962), had construed the appellate rules in a liberal fashion. Under *Foman*, a filing that is technically at variance with a procedural rule may nonetheless be accepted if it is the "functional equivalent" of what the rule requires. *Accord Smith v. Barry*, 502 U.S. 244 (1992).

But in applying these doctrines, *Torres* held, the courts are forbidden to "enlarge" the time limits for filing a notice of appeal. Those time limits are jurisdictional, *Torres* noted, and the limits would be vitiated if courts could later exercise jurisdiction over a party not named in the notice of appeal. While a Court may construe the Rules liberally, it may not waive these jurisdictional requirements even for "good cause shown":

> We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is "imposed by the legislature and not by the judicial process." *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (construing Federal Rule of Civil Procedure 15(c) in a similarly implacable fashion).

Torres, 487 U.S. at 318.

Finally, the *Torres* Court also rejected the argument that petitioner was covered by the use of "et al." in the notice of appeal. Permitting such a vague designation, Justice Marshall wrote, would not meet the specificity requirement of Rule 3(c) of the Federal Rules of Appellate Procedure. It would provide insufficient notice to the other parties, leaving the appellee and the court "unable to determine *with certitude*" whether a losing party should be bound by an adverse

judgment or held liable for costs or sanctions. *Torres*, 487 U.S. at 318 (emphasis added). Because the specificity requirement of Rule 3(c) was not met, the petitioner's appeal was jurisdictionally barred.

Torres thus affirmed the *Covington* court's general approach to the specificity requirement in Rule 3(c): the requirement is jurisdictional, and it means that appellees and the courts must be able to determine "with certitude" which parties are taking the appeal. But *Torres* did not directly address the signature requirement. That, it turned out, would become the job of the Advisory Committee on the Federal Rules of Appellate Procedure.

3. Following *Torres*, the lower courts continued to have difficulty adopting a uniform interpretation of the specificity requirement in Rule 3(c). In response, the Advisory Committee initiated a review of Rule 3(c). This review was to end in further support for the *Covington* view that *pro se* parties could only meet the specificity requirement by signing the notice of appeal.[22]

The Advisory Committee began by inviting public comment on clarifications to Rule 3(c). Among the handful of comments was one from Public Citizen Litigation Group, a public interest law firm. Public Citizen criticized the results of *Torres* and suggested extensive revisions to the rule.[23] Of

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[22] The Committee Note states in part that:

> The amendment is intended to reduce the amount of the satellite litigation spawned by the Supreme Court's decision in Torres. . . . In Torres, the Supreme Court held that the language of Rule 3(c) requiring a notice of appeal to "specify the party or parties taking appeal" is a jurisdictional requirement and that the naming of the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants.

Fed. R. Civ. P. 3, Advisory Committee Notes (1993 Amendments).

[23] Indeed, among other things, Public Citizen urged the Advisory Committee to overturn *Torres*:

all the commenters, only Public Citizen suggested language dealing with *pro se* appeals, and its proposal ran directly counter to the approach in *Covington* and the other cases that required a signature as part of the specificity provision. Public Citizen's proposed language was unambiguous: "A notice of appeal filed pro se shall constitute an appeal on behalf of the party and any members of his or her immediate family who are parties, unless the notice of appeal clearly indicates to the contrary."[24] While Public Citizen did not acknowledge the cases like *Covington* that had found a signature requirement in Rule 3(c), its proposal would have overruled them *sub silentio*. If the Public Citizen language had been adopted, any "notice of appeal filed *pro se*" would "constitute an appeal on behalf of the party"—whether the notice was signed or not.[25]

In response to this comment, the Advisory Committee was persuaded to add a provision on how *pro se* parties should meet the specificity requirement, but it refused to accept Public Citizen's handling of the signature requirement. After receiving the public comments and the views of other Advisory Committee members, the committee chair, Judge Kenneth F. Ripple, prepared a revised draft of Rule 3(c). This draft incorporated much of the Public Citizen

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> Nor should the Committee feel bound to recommend a Rule requiring each and every individual name[d] in the text or caption of the notice, just because that is what the Court held in Torres. After all, the Torres majority made crystal clear that it was not making any pronouncement on what requirements were either fair or sensible; it was only construing the language of the Rule, and thus was not free to write on a clean slate.

Letter from Public Citizen Litigation Group to Joseph F. Spaniol, Jr., Secretary of the Committee on Rules of Practice and Procedure of May 4, 1992, at 4. *See* Lodging Material, Vol. I at 51.

[24] *Id.* at 5; Lodging Material, Vol. I at 52.

[25] *Id.*

language.[26] But in Judge Ripple's version, it was necessary for the *pro se* party to *sign* the notice of appeal: "A notice of appeal filed *pro se* is filed on behalf of the party signing the notice" and the signer's spouse and minor children. Fed. R. App. P. 3 (1993). This formulation was accepted by the Advisory Committee and ultimately adopted without change in 1993.

This history shows first that the signature requirement is directly descended from the requirement, emphasized in *Torres*, that the parties appealing the judgment must be specified in the notice of appeal. *Covington* and other cases had already adopted a reading of "specify" that required not just a naming of the parties, but also evidence in the form of a signature that the named parties in fact wished to pursue the appeal. The Advisory Committee, after an intense drafting effort focused entirely on the specificity requirement, adopted the *Covington* gloss on that requirement. It did so, moreover, with the full understanding, grounded in *Torres*, that the specificity requirement was jurisdictional. Put another way, the signature requirement added in 1993 was intended as an interpretation of the jurisdictional requirement that the notice

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[26] The Advisory Committee held deliberations during and after the comment period. After some debate within the committee, Judge Ripple circulated a May 21, 1992, memorandum proposing a revision of the language published for comment. Memorandum From Hon. Kenneth F. Ripple to Members of the Advisory Committee on the Federal Appellate Rules (May 21, 1992). *See* Lodging Material, Vol. I at 57-61. Exh. C. Judge Ripple's memorandum included the signature requirement. Final deliberations apparently took place in a May 26 conference call. Minutes of the May 26, 1992 Telephone Conference of the Advisory Committee On Appellate Rules. *See* Lodging Material, Vol. I at 65-69. Neither the Minutes nor the Memorandum discusses this change.

The materials described above have been lodged with the Clerk of the Court. *See* Lodging Material, Vol. I. We are indebted to John K. Rabiejand and Judith W. Krivit of the Rules Committee Support Office of the U.S. Courts for their assistance in researching the public records of the Advisory Committee.

of appeal must "specify the party or parties" appealing. That is plainly why the change was rather awkwardly stuck into the middle of Rule 3(c), immediately after the provision requiring that the notice specify the parties.[27]

This history further demonstrates that the Advisory Committee intended its new provision to add a signature requirement to appellate Rule 3(c). It is hard to see any other reason for rewriting the original Public Citizen proposal. It is reasonable to assume that the change was made with full awareness of *Covington* and similar decisions. The usual presumption that drafters understand the precedential background against which they draft has more than the usual force here.[28] The Advisory Committee had just spent months reviewing the case law related to the specificity provision in Rule 3(c), and Judge Ripple in particular had recently served on both of the Seventh Circuit panels that grappled with the *pro se* signature requirement. *See Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 831 (1986); *Robinson v. City of Chicago*, 868 F.2d 959, 962 n.2 (9th Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990). With that as background, it is unlikely that the committee revised the Public Citizen language without intending to require a signature or to make that requirement jurisdictional.

4. One last chapter in this history disposes of a further argument put forward by Petitioner. He contends that his unsigned notice of appeal was the functional equivalent of a proper notice because it satisfied the requirements of Rule 3(c)(1), which says

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[27] The Appendix to this brief sets forth Rule 3(c) as it appeared before 1993, as well as after the 1993 and 1998 revisions.

[28] *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute . . . .").

> (1) The notice of appeal must:
>
> (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice . . . ;
>
> (B) designate the judgment, order, or part thereof being appealed; and
>
> (C) name the court to which the appeal is taken.

Fed. R. App. P. 3(c)(1). Petitioner's argument is premised on an unspoken assumption that the only "really jurisdictional" requirements of Rule 3(c) are these three items in subdivision 3(c)(1), and that the *pro se* signature provision in subdivision 3(c)(2) is just an optional bit of procedural clarification.

In fact, as detailed above, in 1993 the drafters carefully (if awkwardly) placed the *pro se* signature provision immediately between what are now subdivisions (1)(A) and (1)(B), showing their intent to make the signature provision a direct gloss on language that *Torres* had recently held to be jurisdictional. That decision made sense as a guide to the drafters' intent, but it was hardly a model of syntax and organization. For that reason, when a wholesale "style" edit of the rules was undertaken in 1998, the lengthy and convoluted provisions of Rule 3(c) were broken into numerous subdivisions and reorganized.[29] That led to the separation of the *pro se* signature requirement from the specificity requirement. There is, however, no basis for claiming that these changes were intended to have substantive effect. In fact, the 1998 drafters emphasized their purely stylistic objective and carefully omitted Rule 3(c) from the list of provisions that had undergone substantive changes:

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[29] *See* App. at 2a.

> The language and organization of the Rule are amended to make the Rule more easily understood. In addition to changes made to improve the understanding, the advisory committee has changed language to make style and terminology consistent throughout the Appellate Rules. These changes are generally intended to be stylistic only; in this Rule, however, substantive changes are made in subdivisions (a), (b), and (d).

Fed. R. App. P. 3, Advisory Committee's Notes (1998 Amendments).

Despite the 1998 editors' avowed intent to avoid substantive change, there is no doubt that their "stylistic" edits have proven to be a source more of confusion than clarity in the present case. Not only did the 1998 changes obscure the jurisdictional nature of the signature requirement as described above, but they also muddied the signature provision, at least a bit. In 1993, the expectation that each *pro se* appellant would sign the notice was communicated clearly ("A notice of appeal filed pro se is filed on behalf of the party signing the notice ..."); the 1998 stylistic revisions made this expectation a whisker less clear, though not fatally so ("A pro se notice of appeal is considered filed on behalf of the signer . . ."). Taken in context, however, none of the changes made in 1998 can be given substantive weight.

If the 1998 drafters had intended to remove the *pro se* signature requirement from the portion of Rule 3 that is jurisdictional, surely they would not have called the change "stylistic." In fact, the practice of those and earlier drafters was to treat all portions of appellate Rule 3 as jurisdictional except when a contrary intent was clearly expressed. For example, to make sure that the procedures required in Rule 3(d) were not interpreted as jurisdictional, an express provision to that effect was added to the rule: "The district clerk's failure to serve notice does not affect the validity of the appeal." Fed. R. App. P. 3(d). Similarly, earlier drafters

felt compelled to announce their intent "that the failure to prepay the statutory filing fee [required by Rule 3(e)] does not constitute a jurisdictional defect." *See id.*, Advisory Committee's Notes (1979 Amendments). No such disclaimer has ever been made about the signature provision of Rule 3(c)(2).

C. The Requirements of Rule 3(c) May Not Be Waived

Even if the signature requirement is jurisdictional, Petitioner and Respondent argue, the lack of a signature can be forgiven. They suggest that the courts are required or authorized to overlook the lack of a signature by Rule 3(c)(4) or by Rule 2. In fact, these provisions will not bear the weight Petitioner asks them to carry.

1. Appellate Rule 3(c)(4) provides that an appeal "must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4).

a. The first half of this savings clause is plainly inapplicable. An unsigned notice of appeal is not simply "informal"—it lacks a required element. Here, *Torres* is dispositive. In *Torres*, the Petitioner was mistakenly omitted from the notice of appeal but argued that this error should be excused as a mere "informality of form or title." *Torres*, 487 U.S. at 314. The *Torres* Court emphatically disagreed, declaring that "[t]he failure to name a party in a notice of appeal is more than excusable 'informality'; it constitutes a failure of that party to appeal." *Id.* If a required element is missing from the notice of appeal, Justice Marshall wrote for the Court, it may not be supplied later:

> Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the

> time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Id. at 315. Precisely the same analysis applies to the signature requirement. It is required by the rule, and therefore its omission is not a mere informality.

b. The second half of subsection 3(c)(4) provides that an appeal should not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4). This provision is doubly inapplicable. First, the failing that it aims to cure is not presented here. Petitioner's notice of appeal is not faulty because it "fails to name" Petitioner, but because he failed to sign it. Second, the provision applies only when the party's intent is "clear from the notice"—not from later filings or testimony or other external evidence. This phrasing does not authorize some formless appellate factfinding exercise to determine the party's intent. On the contrary, the Advisory Committee intended this language to apply only when it was "objectively clear that a party intended to appeal. . . ." *See* Fed. R. App. P. 3(c), Advisory Committee Notes (1993 Amendments). Far from undercutting the signature requirement, this provision explains its necessity. Without a *pro se* party's signature, there is no "objective evidence" within the corners of the notice of appeal that the party did indeed intend to appeal.

The simple filing of the notice cannot by itself be objective evidence of intent to appeal or the signature requirement would be a dead letter, since it is only relevant if a notice of appeal has been filed. Even in a case involving a single appellant, it would be risky to waive compliance with the signature rule.[30] This would be an anomalous reading of a

[30] In a multiple appellant case, treating an unsigned notice of appeal as evidence of intent to appeal just begs a new question: Whose intent? If two of the parties that failed to sign step forward and ask to get the benefits of the presumption of intent, there is no way for the court of appeals to choose between them, short of a hearing.

rule that imposes its obligations on "the signer" in the singular. Waiving the requirement would also open the door to third-party interlopers and to "deniable" notices of appeal that allow *pro se* appellants to disavow responsibility in the event that the court of appeals seeks to impose costs for a frivolous filing. *See* page 9 and note 6, *supra*.

2. Nor can the signature requirement be waived by reference to *Foman v. Davis*, 371 U.S. 178 (1962), or the provision of appellate Rule 2 that authorizes the courts of appeals to suspend the requirements of the appellate rules "for other good cause" shown. Fed. R. App. P. 2. Again, *Torres* is our guide. The *Torres* Court recognized that *Foman* and Rule 2 stand for the proposition "that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres*, 487 U.S. at 316. But, *Torres* declared, those principles could be applied only when "the litigant's action is the functional equivalent of what the rule requires." *Id.* at 317. To be the functional equivalent of a notice of appeal, a document must contain all the elements required by Rule 3(c).

The *pro se* party's signature is required by Rule 3(c); indeed, it is part of the same "specificity" requirement that *Torres* identified as jurisdictional. A document that does not contain each *pro se* party's signature—somewhere—cannot be the functional equivalent of a proper notice of appeal.

Even less comfort for Petitioner is to be found in Rule 2, which allows appellate courts to suspend the rules or grant extensions liberally for good cause—except with respect to the deadline for filing a notice of appeal. As the history of Rule 3(c) shows, the signature requirement is intended to be

part of the jurisdictional requirement of specificity. And as *Torres* makes clear, parties may not cure noncompliance with Rule 3(c) after the time for filing an appeal has expired:

> More broadly, Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Rule 26(b), however, contains certain exceptions to this grant of broad equitable discretion. The exception pertinent to this case forbids a court to "enlarge" the time limits for filing a notice of appeal, which are prescribed in Rule 4. We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal. Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Torres, 487 U.S. at 314-15.

III. An Appellant's Typed Name Does Not Satisfy The Signature Requirement

A. Treating a Typed Name as a Signature Would Defeat the Purpose of the Signature Requirement

Petitioner further argues that his typed name should be treated as a signature. Pet. Br. 4-5. This argument has been rejected by each of the appellate courts that considered it in the context of the Rule 11 signature requirement.[31] And for

[31] *See Giebelhaus v. Spindrift Yachts*, 938 F.2d 962, 965-66 & n.1 (9th Cir. 1991); *White v. Am. Airlines, Inc.*, 915 F.2d 1414, 1426-27 (10th Cir. 1990).

good reason. It is utterly inconsistent with the purpose of requiring each *pro se* party to sign the notice of appeal. A *pro se* party's signature on the notice provides objective evidence within the four corners of the document that the party intends to join the appeal. Substituting a typed name for a handwritten signature would eliminate the signature's evidentiary value. After all, the signature requirement grew out of a concern that *pro se* parties may be a bit too willing to type the names of their coparties on legal filings. Treating typed names as signatures will only encourage that practice.

Indeed, if Petitioner's definition of signature were adopted, the next issue would be predictable: What if there is no name at all on the signature line, but the purported appellants' names were typed somewhere else in the document—such as the caption or the list of parties? Has that notice been "signed" as well? This slope is not just slippery, it is glazed. If the commercial cases are accepted as a guide, they already treat even letterheads as signatures, showing little or no regard for where in the communication the "signature" is to be found.[32] What is more, appellate Rule 3(c)(4) expressly preserves notices whose only flaw is informality. If typewritten names are accepted as signatures, it would almost certainly be held a "formality" to insist that the names be typewritten in a particular place. In short, once a typed name is treated as a signature, the place where the typing occurs will soon become irrelevant, and at that point the signature requirement will have disappeared entirely, since every notice of appeal that successfully names the parties, either in the

[32] *See Carna v. Bessemer Cement Co.*, 558 F. Supp. 706, 708-09 (W.D. Pa. 1983) (pre-printed name of a company constitutes a signature on a bill of lading, citing U.C.C. § 1-201, official comment 39, which notes that a signature may be on any part of the document and in appropriate cases may be found in a letterhead); *see also* William E. Wyrough, Jr. & Ron Klein, *The Electronic Signature Act of 1996: Breaking Down Barriers to Widespread Electronic Commerce in Florida*, 24 Fla. St. L. Rev. 407, 419-20 (1997) (also citing U.C.C. § 1-201, official cmt. 39).

caption or elsewhere, will automatically be deemed to include the parties' signatures.

B. The Cases Cited by Petitioner are Inapt

Nothing in the cases mustered by Petitioner compels such an absurd result. On the contrary, Petitioner candidly acknowledges that some of the definitions he cites imply that a signature must be handwritten, while others do not. Pet. Br. 10. The reason for this divergence is simple: the courts' interpretation of how best to satisfy a signature requirement depends on the underlying purpose of the requirement.[33] The cases assembled by Petitioner are unpersuasive precisely because they address signature requirements from very different contexts and with very different purposes.

1. For example, contracts, bills of lading, and bank notes generally require signatures to show that the signing party assented to a commercial arrangement. In commercial cases, too, the trial court is free to examine other, external evidence that may make the signature simply one more piece of evidence of assent, and often a redundant one at that.[34] Not surprisingly, once assent has been proven, the courts are reluctant to demand the formality of a handwritten signature as well. But in the context of a notice of appeal, extrinsic evidence of intent is largely unavailable. The appeals court is no place for a hearing, or even for admitting potentially

[33] *See* Christopher B. Woods, *Comment, Commercial Law: Determining Repugnancy in an Electronic Age: Excluded Transactions Under Electronic Writing and Signature Legislation*, 52 Okla. L. Rev. 411, 425-26 (1999).

[34] *See, e.g., Orchard Group, Inc. v. Konica Med. Corp.*, 135 F.3d 421, 427 (6th Cir. 1998) (company representative's prior dealings with other party is evidence that the representative had apparent authority to bind his company to a contract); *Dawson v. Gen. Motors Corp.*, 977 F.2d 369, 372-73 (7th Cir. 1992) (allowing evidence of parties' course of dealing and external discussions for purpose of demonstrating ambiguity of parties' intent to be bound).

conflicting evidence of each party's intent. That is why the Advisory Committee in 1993 stressed that the notice of appeal itself must provide "objective evidence" of the party's intent to appeal—because the notice of appeal is the only evidence that the appeals court is able to receive.

Congress recently made plain its view that commercial definitions of "signature" cannot be applied willy-nilly to signatures on court filings. Last year, hoping to promote the growth of electronic commerce, Congress made electronic signatures the full legal equivalent of handwritten signatures in almost every context. *See* Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) ("E-SIGN Act," codified at 15 U.S.C. §§ 7001 *et seq.*). To demonstrate its sense of urgency, Congress also preempted the laws of states that failed to promptly accept the equivalence of electronic and handwritten signatures in a manner consistent with E-SIGN. 15 U.S.C. § 7002(a). But even as it pressed the states to recognize unconventional signatures, Congress refused to do the same to the courts. Instead, it entirely excluded from the effects of its law any signature requirements relating to "official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings." 15 U.S.C. § 7003(b)(1).

2. Equally inapposite are the cases upholding alternate signing methods by various public functionaries. *See* Pet. Br. 12. As in a commercial setting, the signature on a court-issued document is not the only means by which parties relying on the document can authenticate the identity and intent of the signer. There are other important institutional indicators of authenticity that surround a court-issued document – the parties to whom an order has been issued or a decision rendered have been part of ongoing proceedings in the court; frequently, there will be subsequent proceedings that serve to confirm, at least implicitly, the authenticity of

the document; and, in the rare case in which an affected party truly has reason to question the authenticity of an order or a decision, he or she can make appropriate inquiries to a clerk of the issuing court with relative ease. Likewise, an indictment or a search warrant, which (unlike a court order or decision) may be a person's first contact with the issuing law enforcement body, nonetheless emanates from a public institution with an established set of rules and procedures.

The same simply cannot be said for a *pro se* filing that contains the typewritten names of other *pro se* parties. Indeed it is hard to imagine a situation less buttressed by institutional guarantees of authenticity. One person can easily and without much thought type another's name in a notice of appeal. Forgery of a typewritten signature is far more difficult to prove than forgery of a handwritten signature. That is why a handwritten signature is necessary. Unlike a typed name it provides its own "biometric" assurance against forgery.[35]

3. Finally, Petitioner invokes the local court rules of the Northern District of Ohio, which allow attorneys to electronically sign court documents. Pet. Br. 14. This argument fails to take into account the crucial distinction between attorneys and *pro se* parties. Even if the Southern District of Ohio, where this case arose, had the same rule—and it quite emphatically does not[36]—Petitioner could not

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[35] *See* Sanu K. Thomas, *Note, The Protection and Promotion of E-commerce: Should There Be a Regulatory Scheme for Digital Signatures?*, 22 Fordham Int'l L.J. 1002, 1017 (1999) (citing R.R. Jueneman & R.J. Robertson Jr., *Biometrics and Digital Signatures in Electronic Commerce*, 38 Jurimetrics J. 427, 427 (1998)) ("laws require [a] written signature [because] that written signature identifies [the] signer and that person's normal signature changes slowly and is very difficult to alter, erase, or forge without detection").

[36] The local rules of the Southern District of Ohio do not permit electronic signatures, and even trial attorneys are instructed on the difference between a signature and a "typed name":

use the electronic signature system, for a simple reason. He is not a member of that bar. He is not subject to the rules and responsibilities that apply to members of the bar, and he does not face the threat of bar discipline for misconduct. Because attorneys are subject to bar discipline, it may be entirely logical to allow them to sign documents by alternate methods that provide less authentication than handwritten signatures. The courts are not required to ignore this difference in deciding when to accept typewritten "signatures" on pleadings.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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> All pleadings and motions filed on behalf of a party represented by counsel shall be signed by one attorney in his or her individual names as the trial attorney. . . , followed by the designation "Trial Attorney" together with his or her typed name, ... When one attorney signs on behalf of another, the full signature of each must appear; signatures followed by initials are unacceptable because the Court must determine who has actually signed the document. (*E.g.*, "/s/ Joan Doe by /s/ Richard Roe per telephone authorization.").

S.D. Ohio Loc. Civ. R. 83.5(b). While Petitioner is not a trial attorney, it is hard to read this passage as authorizing anyone, whether *pro se* or member of the bar, to "sign" a filing by typing a name on the signature line.

APPENDIX

APPENDIX

Federal Rules of Appellate Procedure

Rule 1(a) of the Federal Rules of Appellate Procedure reads:

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

Rule 3(c) of the Federal Rules of Appellate Procedure, as adopted in 1998, reads:

(c) Contents of the Notice of Appeal

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

After the 1993 amendments and before the 1998 amendments, Rule 3(c) read as follows:

A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or party thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Before the 1993 amendments, Rule 3(c) read as follows:

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Federal Rules of Civil Procedure

Rule 11(a) of the Federal Rules of Civil Procedure reads:

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.